SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968.

No. 1355.

BLUMCRAFT OF PITTSBURGH, a Partnership Consisting of Hyman Blum, Max Blum, Louis Blum and Harry P. Blum,
Petitioner,

v.

CITIZENS AND SOUTHERN NATIONAL BANK OF SOUTH CAROLINA,
DANIEL CONSTRUCTION COMPANY, INC.
and COLONIAL IRON WORKS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

PETITION FOR REHEARING.

JAMES C. MCCONNON,
HENRY N. PAUL, JR.,
PAUL & PAUL,
1815 Land Title Building,
Philadelphia, Pa. 19110,
RALPH BAILEY, JR.,
BAILEY & DORITY,
125 Broadus Avenue,
Greenville, S. C. 29601,
Attorneys for Petitioner.

International, 741 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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OCTOBER TERM, 1968.

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BLUMCRAFT OF PITTSBURGH, A PARTNERSHIP CONSISTING OF HYMAN BLUM, MAX BLUM, LOUIS BLUM AND HARRY P. BLUM,

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v.

CITIZENS AND SOUTHERN NATIONAL BANK OF SOUTH CAROLINA, DANIEL CONSTRUCTION COMPANY, INC. AND COLONIAL IRON WORKS, INC.,

Respondents.

PETITION FOR REHEARING.

Petitioner, Blumcraft of Pittsburgh, hereby prays that this Court grant rehearing of its order of June 16, 1969, denying the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above-captioned case, as prayed for in the Petition filed by Blumcraft of Pittsburgh on May 3, 1969.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

New Infringement Suits Involving the Design Patent and the Copying of the Design by Manufacturers in Virtually Every Federal Circuit Emphasize the Widespread Public Interest in the Blum Design and the Need to Settle the Question of Patent Validity Produced by the Conflicting Decisions of the United States Court of Claims and the Court of Appeals For the Fourth Circuit.

On June 16, 1969 the Court denied the Petition for Certiorari seeking review of the decision of the Court of Appeals for the Fourth Circuit reversing the judgment of the District Court for the District of South Carolina and holding United States Patents Nos. D-171,963 and 2,905,445 invalid. The petition was based upon the following facts:

1. The decision of the Court of Appeals holding the design patent invalid is in direct conflict with the decision of the Court of Claims holding the patent valid. *Blumcraft of Pittsburgh v. United States,* 372 F. 2d 1014 (1967).

2. The decision of the Court of Appeals for the Fourth Circuit is also in conflict with the principles of the decision rendered by a different panel of the Court of Appeals for the Fourth Circuit in *Anderson's-Black Rock, Inc. v. Pavement Salvage Co., Inc.,* certiorari granted No. 1014, October Term, 1968.

Since the denial of the petition for certiorari, the design patent has become the subject of the following two infringement suits in the Fifth Circuit:

Blumcraft of Pittsburgh v. Metallic Engineering Co., Inc., Civil Action No. 69-797, District Court for the District of Florida.

Blumcraft of Pittsburgh v. Kawneer Co., Inc. et al., Civil Action No. 12847, District Court for the Northern District of Georgia, Atlanta Division.

The denial of certiorari means only that there were not four members of the Court who thought that the case should be heard, and carries with it no implication whatever regarding the merits of the case. See *Brown v. Allen*, 344 U. S. 443, 492 (1953); *House v. Mayo*, 324 U. S. 42, 48 (1945); *United States v. Carver*, 260 U. S. 482, 490 (1923). The denial of certiorari in the present case, as in all patent cases, not only fails to settle the question of validity of patents which have been litigated but specifically and without any possible implication one way or the other leaves that question open for further litigation.

The design patent has been litigated to judgment in the United States Court of Claims and in the District Court for the District of South Carolina. Both Courts held the patent valid and infringed. The decision of the Court of Appeals for the Fourth Circuit reversing the judgment of the South Carolina court produced the conflict set forth in the petition for certiorari. The denial of the petition for certiorari means that this conflict will remain unresolved. The Court of Appeals for the Fifth Circuit clearly recognized this principle in *Poster Exchange, Inc. v. National Screen Service Corp.*, 362 F. 2d 571 (1966), wherein it held that the Supreme Court's denial of certiorari is in no sense a legal determination, citing *Brown v. Allen*. See also *Texas Construction Co. v. United States of America*, 236 F. 2d 138 (5th Cir., 1956). The District Court for the District of Florida and the District Court for the District of Northern Georgia are thus free to hold the design patent either valid

or invalid on precisely the same prior art as was presented to the Court of Claims and the District Court for the District of South Carolina.

There continues to be every reason to believe that in addition to the two suits filed in the Fifth Circuit there will be other litigation involving infringement of Louis Blum's design patent. Although, as the testimony in this case established, it has long been evident that there has been widespread copying of Louis Blum's design by a number of railing manufacturers who have advertised such railings in their catalogs, actual proof of infringement involving manufacture, use or sale of railings bearing the design has not yet been established in all cases. In the present case Architectural Art's catalog advertising the infringing design was discovered in early 1959 but after Architectural Art's refusal to admit manufacture and sale of the railings it advertised it was not until 1961 that the actual railing in suit was found in South Carolina and this suit was begun. As the evidence has established, Blumcraft of Pittsburgh is a relatively small firm with no nationwide sales service. In order to locate infringing railings it is necessary for Blumcraft to initiate efforts specifically directed to that end from its office in Pittsburgh, Pennsylvania. It was pointed out in Petitioner's Reply Brief that railings of other manufacturers have been under investigation. Infringements in Florida and Georgia have been established as the result of such investigations.

It is manifest that, in the present posture of the litigation, Petitioner has no choice but to continue to bring suits for infringement in the different Circuits where infringement has been or may be found. It must be recognized that in such additional litigation the patent may be found valid or invalid, depending upon whether the particular court agrees with the decision of the Court of Claims and the District Court of South Carolina or that of the

Court of Appeals for the Fourth Circuit. The denial of certiorari leaves the question open for further litigation.

This Court has repeatedly held that it is in the public interest that a judicial determination be reached as to the validity or invalidity of disputed patents. Most recently, on June 16, 1969, this Court, by its decision in *Lear, Incorporated v. John S. Adkins,* No. 56, October Term, 1968, reversed its own prior decision in *Automatic Radio Co. v. Hazeltine,* 339 U. S. 827, 836 (1950) and removed from the law the doctrine of licensee estoppel which had existed for more than one hundred years. This was done for the express purpose of insuring that there be no limitation on the right to raise an issue of patent validity or invalidity. The Court reaffirmed the principal of *Pope Manufacturing Co. v. Gormully,* 144 U. S. 224, 234 (1892):

> "It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly . . ."

On the same day, June 16, 1969, this Court, by denying certiorari in the present case, effectively announced that it would not determine whether Louis Blum had procured a "worthless patent" or made a "really valuable invention". It is not for a moment to be supposed that the Supreme Court should decide the validity of every patent that is litigated but it is the inescapable fact that when courts of coordinate jurisdiction such as the United States Court of Claims and the Court of Appeals for the Fourth Circuit disagree as to the validity of a patent in clear cut and irreconcilable terms, only the Supreme Court can settle the question.

The patents in suit are not paper patents of limited public interest. The United States Government, Architectural Art and Blumcraft have gone through two complete law suits testing the validity and infringement of the design

patent. Additional suits are now pending. In the accounting proceedings in the Court of Claims it has been established that the railing designs advertised by the following manufacturers would, if actually manufactured and sold to the Government, infringe Louis Blum's design patent:

Railing Manufacturer	*Location*	*Federal Circuit*
Architectural Aluminum Co.	Cedar Rapids, Iowa	8th
Architectural Art Mfg. Co.	Wichita, Kansas	10th
Armco Steel Corporation	Middletown, Ohio	6th
Best Metal Kraft, Inc.	Pitcairn, Pennsylvania	3rd
Guildcraft Metals, Inc.	Oklahoma City, Oklahoma	10th
Hankins and Johann, Inc.	Richmond, Virginia	4th
Julius Blum & Co., Inc.	Carlstadt, New Jersey	3rd
Kawneer Company	Niles, Michigan	6th
Livers Bronze Company	Kansas City, Missouri	8th
Newman Brothers, Inc.	Cincinnati, Ohio	6th
Railcraft Corporation	San Francisco, California	9th
Reliance Art Metal Company	Cincinnati, Ohio	6th
Reynolds Metal Company	Richmond, Virginia	4th

Other courts have found copying of the work of Blumcraft with respect to the same subject matter. Specifically, Newman Brothers, Inc. was adjudged to have copied the art work of Blumcraft catalogs illustrating its railing design. *Blumcraft of Pittsburgh v. Newman Brothers, Inc.*, 159 U. S. P. Q. 166 (1968). See also *Blumcraft of Pittsburgh v. Newman Brothers, Inc.*, 6 Cir., 373 F. 2d 905 (1967). In another case, *Blumcraft of Pittsburgh v. Best Metal Kraft, Inc.*, Civil Action No. 17,767 (W. D. Pa.), a consent decree was entered enjoining copyright infringement by another manufacturer who had copied the art work of the Blumcraft catalog illustrating Louis Blum's railing design. Copying of Louis Blum's railing design or Blumcraft art work illustrating the design by other railing manufacturers has been established in the Third, Fourth and Sixth Circuits and in the United States Court of Claims. Additional litigation involving the design patent is now pending in the Fifth and Tenth Circuits. As evidenced by the list of manufacturers advertising similar railings there is a prospect of further litigation in the Seventh, Eighth and Ninth Circuits.

If, as the Court of Appeals for the Fourth Circuit has determined, Louis Blum's patents are worthless, then the denial of certiorari by this Court imposes upon the public an insupportable repression of competition. If on the other hand the United States Court of Claims and the District Court for the District of South Carolina are correct, then the constitutional purpose carried out in our patent laws is thwarted and rendered meaningless.

The question of patent validity under § 103 of the Patent Act will be heard by the Supreme Court in *Anderson's-Black Rock, Inc. v. Pavement Salvage Co., Inc., supra.* It would be the most efficient use of judicial time and effort to hear argument in the present case at the same time.

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

JAMES C. MCCONNON,
HENRY N. PAUL, JR.,
PAUL & PAUL,
RALPH BAILEY, JR.,
BAILEY & DORITY,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

JAMES C. MCCONNON,
Counsel for Petitioner.